

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress Received
Washington, D.C. SEP 15 2016

Copyright Royalty Board

In the Matter of:

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and "Preexisting"
Subscription Services (SDARS III)

Docket No. 16-CRB-0001-SR/PSSR (2018-2022)

SERVICES' MOTION TO DISMISS GEO FROM THIS PROCEEDING

Sirius XM Radio Inc. ("Sirius XM") and Music Choice (both, together with withdrawn participant Muzak LLC, the "Services") respectfully request that the Copyright Royalty Judges (the "Judges") dismiss George D. Johnson d/b/a Geo Music Group ("GEO") from the above-captioned proceeding. GEO's Petition to Participate does not demonstrate its interest in this proceeding as required by the governing regulation, and none of the Services has ever performed, or plans to perform, any of GEO's sound recordings. Accordingly, GEO lacks the "significant interest" required to participate in this proceeding, and dismissal is proper. *See* 17 U.S.C. § 803(b)(2)(C); 37 C.F.R. § 351.1(c).

BACKGROUND

According to GEO, it has been "an individual American singer-songwriter, independent label owner, copyright creator, and owner of exclusive rights" for 30 years. George Johnson's (GEO) Petition to Participate ("GEO Petition") at 1. GEO petitioned to participate in this proceeding on a *pro se* basis, as it did in the ongoing *Phonorecords III* proceeding and the prior *Web IV* proceeding. GEO's petition states that it "has a significant interest under 351.1(b)(1)(i)(B)," *id.*, but does not provide a "description" of that interest, as explicitly required

by regulation. 37 C.F.R. § 351.1(b)(1)(i)(B) (emphasis added). Indeed, in GEO's responses and objections to the Services' First Set of Requests for Production of Documents, it stated that it "has not done any deals at all in the past 3 years with any licensee" and "did not do any deals with any of the Participants in this proceeding or any pre-existing, on-demand, or freemium 'lean back' streaming services." Declaration of Jackson D. Toof ("Toof Decl.") Ex. A. Based on those same responses and objections, GEO's interest instead appears to be a philosophical desire to protest what it claims is "a confiscatory royalty rate at \$0.00 per-performance of a copyrighted sound recording[]." *Id.*

The Services have confirmed that none of them has ever transmitted any of GEO's sound recordings, and none has any plans to do so. Declaration of Cynthia Greer, Esq. ("Sirius XM Decl."); Declaration of Paula Calhoun, Esq. ("Music Choice Decl."); Declaration of Melanie McCool, Esq. ("Muzak Decl."). Consequently, GEO cannot possibly be impacted in any way by rates set in this proceeding, which only apply to Sirius XM, Music Choice, and Muzak.

ARGUMENT

It is clear that an entity may participate in a rate-setting proceeding such as this only if it has a "significant interest" in the proceeding. 17 U.S.C. § 803(b)(2)(C); 37 C.F.R. § 351.1(c). The Judges have previously recognized that this means "only parties with legally protectable and tangible interests may take part" in a rate-setting proceeding. Apr. 30, 2014 Order Granting SoundExchange Motion at 3, *In re Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings* ("Web IV"), Docket No. 14-CRB-0001-WR (2016-2020) ("Web IV Dismissal Order") (quoting Copyright Royalty Distribution Reform Act of 2003, H.R. Rep. No. 108-408, at 27 (2004) ("House Report")). "In other words, to have a significant interest in a royalty rate, the participant must be a party directly affected by

the royalty fee.” House Report at 27. GEO has not demonstrated, and cannot demonstrate, a significant interest in this proceeding and should be dismissed.

First, GEO’s petition fails to describe any legally cognizable interest in this proceeding, as explicitly required by 37 C.F.R. § 351.1(b)(1)(i)(B). Although *pro se* litigants are generally not held to the same standard as attorneys in complying with legal rules and procedures, basic compliance with fundamental rules is still required. *Cf. Kaemmerling v. Lappin*, 553 F.3d 669, 677 (D.C. Cir. 2008) (“Even given the special liberality with which we consider *pro se* complaints, we need not accept inferences unsupported by the facts alleged in the complaint or ‘legal conclusions cast in the form of factual allegations.’”). Indeed, failure to describe an alleged significant interest in a proceeding is by itself sufficient for the Judges to dismiss even a *pro se* participant, as demonstrated by prior decisions. Earlier in this very proceeding, SoundExchange moved to dismiss David Powell, another *pro se* participant. The Judges granted SoundExchange’s motion because “Mr. Powell’s Petition to Participate fails to state any grounds upon which the Judges could conclude that he has any interest, much less the required ‘significant interest’ in the current proceeding.” June 24, 2016 Order Granting SoundExchange’s Motion to Dismiss Music Reports, Inc. and David Powell, at 3. Dismissal of GEO is appropriate for the same reason. *See* GEO Petition.

Second, even if GEO has some theoretical policy interest in this proceeding as a singer-songwriter and independent label owner, it cannot have the required *significant* interest required by the Copyright Act. This proceeding was initiated “to determine terms and rates for the licensing of digital transmission of sound recordings and the associated making of ephemeral recordings of sound recordings by satellite radio [SDARS] and ‘preexisting’ subscription services [PSS].” Mar. 14, 2016 Notice of Participants, Commencement of Voluntary

Negotiation Period, and Case Scheduling Order, at 1. Only three entities—the Services—use such licenses, which are available solely to those SDARS and PSS grandfathered by the Copyright Act. *See, e.g., Memorandum Opinion of the Register of Copyrights*, Docket Nos. RF 2006-2 and 2006-3 (Oct. 20, 2003), at 15-16 (identifying the universe of PSS as limited to three entities that were transmitting sound recordings in 1998: Music Choice, Muzak, and DMX (an entity now combined with Muzak)). All three of the Services have confirmed that they have never transmitted any of GEO’s sound recordings and do not plan to do so in the future. Sirius XM Decl. ¶ 2; Music Choice Decl. ¶ 2-3; Muzak Decl. ¶ 2. Because the Services do not, and will not, make any use of GEO’s sound recordings, GEO’s sound recordings have never, and will never, be used under the licenses at issue in this proceeding. Accordingly, GEO cannot have a “tangible interest” in this proceeding, and whatever rate the Judges set in this proceeding cannot “directly affect[]” any royalty fees paid to GEO. *Web IV* Dismissal Order; House Report. GEO should therefore be dismissed.

Finally, to the extent GEO merely seeks to object to the rates set in this proceeding (and others) despite not itself using or being subject to the licenses at issue, the Librarian of Congress has previously held such an interest to be insufficient. In a prior PSS rate proceeding—which concerned the same licenses for “preexisting” services at issue here—the participants settled, and the rate agreed to in the settlement was submitted to the public for notice and comment. *See* 68 Fed. Reg. 39837-01 (July 23, 2003). An entity called Royalty Logic, Inc. (“RLI”), filed an objection, asserting an interest in the proceeding because it distributed royalties and was a designated agent for royalties collected pursuant to the statutory license for nonsubscription transmission services. At the time of its objection, however, RLI was not a designated agent for royalties collected from “preexisting” services.

The Librarian applied the same “significant interest” standard to RLI’s objection that applies to a petition to participate. *See id.* (“Plainly, for the same reasons that the Librarian must determine whether a petitioner for a rate proceeding has a significant interest in the rates and terms, Congress recognized that a party challenging proposed rates and terms that are the product of a settlement must likewise have a significant, or substantial, interest.”). The Librarian observed that entities who have a significant interest include: (i) a copyright owner whose works are being used under a statutory license; (ii) the person or entity using those works under that license; (iii) an entity that collects the royalties under a statutory license if authorized by the copyright owners whose works are used under that license to represent their interests in a rate proceeding; or (iv) an entity that represents users of copyrighted works under a statutory license, if likewise authorized. Because RLI fit none of these categories, the Librarian determined that RLI did not have a specific interest in the rates and terms agreed to in the settlement and proposed to the public, and was therefore not entitled to object. *Id.*

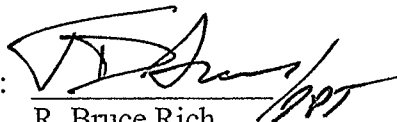
Like RLI, GEO fits none of the categories of entities who might have a significant interest in this proceeding. Its works are not being used under the licenses at issue, and it has not claimed to be using another entity’s works under those licenses, or to be authorized to represent other owners or users of works being used under those licenses. Moreover, the Librarian specifically noted in *PSS II* that “a person or entity that proposes or objects to a rate proceeding solely on the basis of espoused public policy or consumer interest concerns does not have a specific interest.” *Id.* Thus, to the extent GEO’s goal is to protest the nature of these proceedings or the rates set in them, this proceeding is simply not an appropriate forum for such objections, and GEO should be dismissed.

CONCLUSION

For the foregoing reasons, Sirius XM Radio Inc. and Music Choice respectfully request that the Judges dismiss GEO from this proceeding.

Dated: September 15, 2016
New York, NY

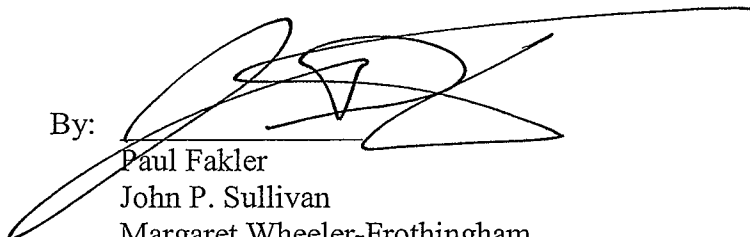
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